92-891

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

BERNARD J. DONESKI, et ux.
Petitioners,

v.

STATE OF MARYLAND,
COMPTROLLER OF THE TREASURY
Respondents.

Petition For Writ Of Certiorari To The
Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether State of Maryland income taxation of pay or compensation for personal service as an officer or employee of the United States: violates 4 U.S.C. § 111; is inconsistent with principles set forth in decisions by The United States Supreme Court in McCulloch v. Maryland, 4 Wheat. 316 (1819), Davis v. Michigan Department of the Treasury, 489 U.S. 803, (1989) and Barker v. Kansas, 503 U.S. ____, 112 S.Ct. 1619 (1992); and, is repugnant to the Constitution of the United States.

PARTIES TO THE PROCEEDINGS

Parties to the proceeding in the Court of Appeals of Maryland were as indicated in the caption and Order of that State's court of last resort, Petitioners being Bernard J. Doneski and (using the Latin word, and abbreviation for his wife) Mary L. Doneski. That court identified Respondent as the State of Maryland, Comptroller of the Treasury.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to the Court of Appeals of Maryland.

OPINIONS DELIVERED BELOW

The Order of the Court of Appeals of Maryland [App. A, infra at 1a] is unreported. The opinion of the Court of Special Appeals of Maryland [App. B, infra at 2a-35a] is reported at 91 Md. App. 614, 605 A.2d 649 (1992). The Memorandum Opinion and Order of the Circuit Court for Montgomery County, Maryland [App. C, infra at 36a-43a] is unreported. The Order and the also unreported Memorandum of Grounds for Decision of the Maryland Tax Court are reprinted in App. D, infra at 44a-50a.

JURISDICTION

Petitioners seek review of the Order of the Court of Appeals of Maryland, dated August 24, 1992, denying the Petition for Writ of Certiorari, which sought review of the decision of the Court of Special Appeals of Maryland affirming judgment: denying Petitioners refund of State

income taxes (of pay or compensation for personal service as an officer of the United States) that Petitioners claimed under 4 U.S.C. § 111 and State law; and denying application of this Court's holding in Davis v. Michigan Department of the Treasury, 489 U.S. 803 (1989).

This petition is filed within the 90-day period allowed by law, and 28 U.S.C. § 1257(a) confers jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Supremacy clause of the United States Constitution, Article VI, cl. 2 provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 4 U.S.C. § 111 provides in pertinent part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

In accordance with U.S. Sup. Ct. R. 14.1(f), texts of pertinent federal and Maryland statutes and regulations are set forth in Appendix F, infra at 55a, and Appendix G, infra at 58a, respectively.

STATEMENT OF THE CASE

Petitioners in this case are Maryland residents, one of whom is a Regular Army commissioned officer, on the U. S. Army Retired List, the other being his wife. For tax years 1985, 1986, 1987 and 1988, Petitioners filed joint State resident tax returns in accordance with Maryland's published instructions. Petitioners thus

paid, and the Maryland Comptroller of the Treasury (Comptroller) collected, tax on individual income from Federal sources[1] while provisions of the Maryland Tax Code exempt income from certain State and local sources.[2]

Under Maryland Tax-General [hereinafter TG] Article §13-901, Petitioners claimed refunds[3] for tax years 1985 through 1988 of the taxes collected on their income from Federal sources. In 1989, the Comptroller denied those requests. The Petitioners appealed to the Maryland Tax

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[1] Income derived from consideration of gain on obligations of the United States in 1985 and 1986, and retired pay/compensation for personal service as an officer or employee of the United States in all four years--income Petitioners contend is exempt under constitutional doctrine, 31 U.S.C. § 3124 and 4 U.S.C. § 111 respectively.

[2] See Md. Tax-Gen. Code Ann. § 10-207 (1988).

[3] TG §13-901 provides in relevant part: "A claim for refund may be filed . . . by a claimant who . . . pays to the State a tax . . . that is erroneously, illegally, or wrongfully collected in any manner . . . ."

Court (hereinafter Md. T.C.), an administrative unit of state government, raising 31 U.S.C. § 3124, 4 U.S.C. § 111, constitutional doctrine and the holding of this Court in Davis v. Michigan Department of the Treasury, 480 U.S. 803, 109 S.Ct. 1500 (1989) as barring the State's discriminatory taxation in violation of federal law. Petitioners also cited various provisions of State law which Petitioners contend to be inconsistent with this Court's holding in Davis.[4] On August 15, 1990, the Md. T.C. order denied the relief sought. App. D at 44a. In its memorandum, the Md. T.C. ignored all but one of the Maryland provisions regarding pay or compensation cited by Petitioners, and held that

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[4] Record at 266-269, 279-283, 304, 313-314, 299-301 and 320. Doneski (Md. Tax Ct. No. 3126) [All further citations to the record extract of proceedings below hereinafter are noted as "R."]

"Davis does not apply." App. D at 50a.

The Petitioners appealed to the Circuit Court for Montgomery County, Maryland. The federal questions sought to be reviewed, including this Court's holding in Davis, were again raised by the Petitioners.[5] The Circuit Court, on May 1, 1991, denied relief to the Petitioners and concluded that "Davis does not apply." App. C at 42a.

The Petitioners then appealed to the Maryland Court of Special Appeals. Again, the federal questions and this Court's holding in the Davis decision as being applicable to the military retired pay were raised.[6]

This Court decided the issue of treatment of military retired pay in the

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[5] R. at 82, 84, 86, 88, 92-96, 121-124, 144-147, 151-155. Doneski (Cir.Ct. Civ. No. 64480).

[6] Brief of Appellants at 12 and 16. Doneski (Md. Ct. of Spec. App. No. 931, Sept. Term 1991).

case of Barker v. Kansas, 503 U.S. ____, 112 S.Ct. 1619, 118 L.Ed.2d 243 (1992), on April 21, 1992--10 days prior to issuance of the Court of Special Appeals ruling in the present case. The Court of Special Appeals cited Barker (as Baker [sic] v. Kansas) in discussion of the issue of taxation of United States obligations. On that issue, the Court of Special Appeals held that Maryland's tax scheme discriminates and violates federal law.

The Court of Special Appeals did not refer to Barker in discussion of the issue of the State's taxation of military retired pay or compensation. Among other things, the Court opined that:

> 1. "State tax law based on these length of service payments, therefore, does not discriminate against federal retirees because they are not retirement payments for state and local employees. Consequently, [TG § 10-207(o) now TG] § 10-207(h) does not violate 4 U.S.C. § 111 . . . ." [emphasis added].

2. "Even if [TG] §§ 10-207(d), 10-207(e), and 10-207(m) were discriminatory against federal retirees . . . . [Petitioners] do not have standing to challenge these provisions of Maryland's tax code."

3. "[T]here is no discrimination . . . in violation of Davis . . . ."

On that basis, the Court denied relief on the issue of state/local income taxation of pay or compensation for personal service as an officer or employee of the United States. App. B at 35a. The Court of Special Appeals issued its opinion on May 1, 1992.

The Petitioners then filed with the Court of Appeals of Maryland a petition for a writ of certiorari, which again raised the matter of 4 U.S.C. § 111 and this Court's holding in Davis,[7] and which sought a review of the adverse decision

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[7] Petition for writ of certiorari at 5 and 6. Doneski v. State of Maryland, Comptroller of the Treasury (Md. Ct. of App. Petition Docket No. 157, Sept. Term 1992).

of the Court of Special Appeals. The petition and Respondent's cross-petition for writ were denied by the Court of Appeals, the highest State Court exercising jurisdiction in this case, on August 24, 1992. App. A at 1a.

REASONS FOR ALLOWING THE WRIT

I. THE FEDERAL QUESTION IS IMPORTANT AND RECURRING.

A. The Federal Question Broadly Stated

This case presents an important and recurring federal question dating from the time this Court's decision was delivered in McCulloch v. Maryland, 4 Wheat. 316 (1819). The question broadly stated is: whether certain state tax schemes violate federal law and the doctrine of intergovernmental tax immunity. The Davis and Barker cases are but two of the most recent examples. States enact tax law in their own self-

interest. But, the Great Chief Justice expounded:

> "A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.
>
> . . . .
>
> This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them."

Id. at 425-426. More recently this Court has held to the same general effect. Federal law and the doctrine of inter-governmental tax immunity are violated when the state acts to benefit itself or favor those who are in privity with state and local governments over the United States or those with whom it deals.

B. The Federal Question Narrowly Drawn

In many cases involving 4 U.S.C. § 111, wherein the federal question is much more narrowly drawn, state courts of last resort have delivered conflicting opinions. Title 4 U.S.C. § 111 requires

consideration of discriminatory taxation because of the source of the pay or compensation. Additionally, the standard of review set forth in Davis requires inquiry as to "whether the inconsistent tax treatment is directly related to and justified by 'significant differences between the two [i.e. federal and state/local] classes.'" Davis 489 U.S. at 816 (quoting Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 383 (1960)).

Further divergence by state courts is inevitable. Therefore, review on writ of certiorari is necessary to resolve existing conflict among the states and to ensure national uniformity in federal law. Such review is also necessary to enforce controlling principles of intergovernmental tax immunity.

II. THE FEDERAL QUESTION PRESENTED SHOULD BE RESOLVED BY THIS COURT

TO PROVIDE AUTHORITATIVE GUIDANCE TO ALL STATES OF THE UNION.

In cases, such as the present, where 4 U.S.C. § 111 controls, federal, current or retired, officers or employees (or all of them) form the federal class. In view of constraints upon the jurisdiction of federal courts imposed by the Eleventh Amendment, the Tax Injunction Act [28 U.S.C. § 1341] and considerations of comity, constitutional challenges to state taxes must ordinarily be pursued through state courts. Initially, the federal officer or employee litigant must place consideration of discriminatory state taxation in violation of federal law and interpretation of the state's inconsistent tax treatment within the jurisdiction of the state courts; and, ultimately, may have to rely on the Supremacy Clause of the United States Constitution and this Court for relief.

This case includes as part of the rest of the state and local class certain "fire, rescue, or ambulance personnel" who receive retirement payments. The Maryland Court of Appeals failed to review this case even though the Court of Special Appeals in reviewing this case failed to make the inquiry required by the federal statute, 4 U.S.C. § 111, whether the taxation discriminates "against the officer or employee because of the source[8] of pay or compensation," and failed to apply the "significant differences between the two classes" standard for review set forth by this

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[8] "[A] State may not single out those who deal with the [Federal] Government, in one capacity or another, for a tax burden not imposed on others similarly situated." Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 383 (1960). "[U]nder this test," it is necessary to examine "the whole tax structure of the state'" in order to determine how other taxpayers similarly situated are treated." Id. [quoting Tradesmens Nat'l. Bank of Oklahoma City v. Oklahoma Tax Comm'n, 309 U.S. 560, 568 (1940).

Court in the Phillips, Davis, and Barker cases, and similar failures by other courts[9] of last resort[10] are likely. Hence, review on writ of certiorari is necessary: to resolve the conflict created by Maryland (perhaps affecting 250,000 federal personnel); to insure national conformity in federal law; to enforce controlling principles and compliance with this Court's previous decisions.

III. THE DECISION BELOW CONFLICTS WITH CONTROLLING PRINCIPLES OF INTERGOVERNMENTAL TAX IMMUNITY REITERATED BY THIS COURT IN THE DAVIS (1989) AND BARKER (1992) CASES

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[9] Some courts below fail to apply Davis. A case (App. E, at 51a - 54a) Respondent introduced in Doneski (Cir.Ct. Civ. No. 64480) used the rational basis test and denied Davis controls. But see Davis, supra, at 1508.

[10] See Gryczynski, Davis vs. Michigan State-by-State Listing, RETIRED OFFICER MAG., Feb. 1992, at 51 - 52.

In the courts below, in addition to the controlling federal statute, 4 U.S.C. § 111, and constitutional doctrine, the Petitioners relied on the holding of the United States Supreme Court in the case of Davis v. Michigan Department of the Treasury, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989). Also, the dissenting opinion of Justice Stevens highlighted Maryland's discrimination because of the source of pay or compensation. Maryland was cited as one of at least fourteen states that "grant special tax exemptions for retirement income to state and local government employees that they do not grant to federal employees." Id. at 1511. The specific Maryland statute cited in Davis[11] is: "Md.

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[11] After Davis, provisions of the Maryland Code were redesignated so that TG § 10-207(o) now refers to any income that federal law exempts from a state tax on income.

Tax-Gen. Code Ann. § 10-207(o) 1988." Id. at 1511 n.3. This cited section is now codified as TG § 10-207(h) as follows:

> (h) Length of service award. -- The subtraction under subsection (a) of this section includes a payment received under a fire, rescue, or ambulance personnel length of service award program that is funded by any county or municipal corporation of the State.

In the courts below, Petitioners cited the above and other provisions of the Maryland Code as violating 4 U.S.C. § 111. Despite this Court's holding in Davis, the Court of Special Appeals of Maryland affirmed the ruling of the Comptroller and the courts below in denying relief to the Petitioners regarding the issue of inconsistent state taxation of pay or compensation. Doneski v. Comptroller, 91 Md.App. 614, 605 A.2d 649 (1992). App. B at 35a.

After quoting TG § 10-207(h), the Court of Special Appeals concluded that the State's tax law does not violate 4 U.S.C. § 111 and this Court's holding in Davis since "length of service payments" funded by the State's political subdivisions do not "discriminate against federal retirees because they are not retirement payments for state and local employees." In reaching this decision, the Court of Special Appeals stated the following:

> (1) Since this provision [§ 10-207(h)] was enacted by the legislature in 1988, the length of service programs that have been created have only been for the benefit of volunteer firefighters and rescue workers. See Md. Ann. Code art. 25, §§ 13A, 13B, 13C, 13D, 32.5, 32.6 (1990 & Supp. 1991); Md. Ann. Code art. 38A, § 43 (1990); . . . . "
>
> (2) "Further, the Comptroller has interpreted § 10-207(h) to apply only in cases where the firefighters, rescue workers or ambulance personnel are volunteers."
>
> (3) "'[Volunteer firemen] are not public officials or public employees.'"

(4) [The military officer], "even though he was a federal employee, could have been a volunteer thereby entitling him to length of service payments."

Doneski, supra, 605 A.2d at 656 (App. B at 31a - 32a).

The Maryland Annotated Code shows that most of the length of service programs were created well prior to 1988. But, note well that in 1989, when Davis was decided, Md. Ann Code art. 25 § 13 B was amended to substitute the words "a length of service award" for the words "the retirement" before the word "program." Clearly, the nature of the length of service program is that of compensation for past service--a retirement program--the sources of funding for which are political subdivisions of the State. Md. Ann Code art. 25 § 13D clearly shows the purpose of the "monetary service" plan is to "encourage" "length of service."

Note well that TG § 10-207(h) applies to "a payment received" by "personnel" for "length of service." TG § 10-207(h) exempts from state taxation a retirement payment for past services to the state local government entity. Despite the obvious, the Court of Special Appeals, ignoring the source of compensation, focused on the state/local class as being "volunteers" and not "public officers or public employees." This view directly conflicts with Md. Ann. Code art. 38A § 39 which states in relevant part:

> For the purpose of any . . . law or benefit which should accrue to personnel, paid or volunteer, who are performing any service anywhere for a fire department or rescue squad of this State . . . said personnel shall be held and considered to have performed that service in the course of employment and in the line of duty in order that he might fully qualify for any benefits otherwise accruing. (1967, ch. 395.)

Md. Ann. Code art. 38A § 45 states that:

> "Any volunteer firefighter or rescue squad member engaged in firefighting

> or rescue activities...shall be considered for purposes of the Federal Public Safety Officers' Benefit Act of 1976 to be 'on duty' during the activity."

Thus, by the series of definitions of public safety officers, public agency, firefighter, rescue squad, and ambulance crew now codified in 42 U.S.C.S. § 3796b, such "volunteer" personnel become "public safety officers" serving the State or its political subdivisions.

The statutes quoted above were properly cited by the Petitioners in their brief to the Court of Special Appeals, but the court did not mention the statutes in its adverse decision.

The Court of Special Appeals opinion, that the federal employee [military officer] could have obtained the length of service benefit, is in error. The record reflects the federal military officer's performance of fire and rescue service during more than 25 years, more

than five of which were served overseas and a number of others assigned in states other than Maryland. During the period others might qualify by age 50 for the Maryland length of service benefit, Petitioner served another sovereign, the United States Government. R. at 505, 508-509.

Moreover, under 10 U.S.C. § 973:

> "No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties . . . . an officer to whom this subsection applies may not hold or exercise . . . the function of a civil office in the government of a State (or any political subdivision of such government)."

Under 5 U.S.C. §3373, federal employees assigned to duties with a State "may not receive benefits...based on service during an assignment...under any State or local government retirement program."

The Petitioners contend that the Maryland Court of Appeals totally failed to apply the standards set forth in 1989 by this Court in the Davis case, and in the subsequent 1992 case of Barker, to determine whether the Maryland statutes cited by the Petitioners discriminate between Federal and State or local retirement payments in violation of 4 U.S.C. § 111.

The proper standard is as follows:

> "[W]e evaluate a state tax that is alleged to discriminate against federal employees in favor of state employees by inquiring 'whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'"

Barker v. Kansas, 503 U.S. ____, 112 S.Ct. 1619, 118 L.Ed.2d 243 at 249 (1992), (citing Davis 489 U.S. at 816, quoting Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 383 (1960)).

Hence, the Court of Special Appeals, by its total focus on the "volunteer" aspect of the personnel, has failed to apply the standards set forth by this Court in Davis and Barker as to whether there are "significant differences between the two classes" of federal and state or local retirees. Certainly, the nicety applied by the Court of Special Appeals that the personnel are "volunteers" and not "public officials" or "public employees" --despite the Md. Ann. Code art. 38A, §39 statutory requirement that they be held to have performed service in the course of employment--does not meet the required test. At least, the courts below did not stretch reality to hold that these personnel were not "retirees," except that the Md. T.C. stated that a length of service award was not a pension. App. D at 49a. However, Md. Code Ann. art. 73B § 1 defines "pension" as "payments for

life derived from money provided by the State" and TG §§ 2-606, 2-607, and 2-608 show the State source of funds to the State's political subdivisions. Moreover, the Md. T.C. and all other courts below overlooked that the record shows, at R. 456.1, the agreement of the Maryland Tax Court Judge and Respondent's Counsel that pay or compensation derived from Maryland sources is exempted because of the source. This violates 4 U.S.C. §111.

It should be noted that in the Barker case, even though the Supreme Court of Kansas listed six differences between the applicable state/local retirement benefits and military retirement benefits, this Court in Barker still ruled in favor of the taxpayers and held the six differences listed not to be "significant" under the Davis standard. See Barker, supra, at 250.

Regardless of the label that the state would seek to apply to the people it favors by TG § 10-207(h) who receive payment under a "fire, rescue, or ambulance personnel length of service" program, the plain fact is that such "retirement benefits are deferred compensation for past years of service rendered to the [g]overnment." This quoted language is that used by this Court in deciding in Davis that 4 U.S.C. § 111 applies to Federal civil service retirees as well as to current federal employees. Davis, supra, at 1504. Similarly, it appears clear this Court would also conclude that the "payment" the State exempts under TG § 10-207(h) is "deferred compensation for past years of service" to the State and its political subdivisions regardless of whether or not TG § 10-207(h) has to date only been applied to "volunteers," and has been

interpreted by the Maryland Comptroller only to apply to "volunteers" (See Doneski, supra, at 656.

Hence, there can be little question that this case involves a favored class of state or local retirees who receive payments for past services exempted from state taxation under TG § 10-207(h) and a disfavored class of federal military retirees taxed by the State. The contention of the state, which was erroneously affirmed by all of the courts below, that the class of state or local retirees does not exist because they are "volunteers" and therefore not "public employees," is contradicted by a specific Maryland statute (art. 38A, § 39), and creates an illusion which avoids reaching the standard for review established by this Court in the Davis and Barker decisions as to whether a "significant difference" exists between the classes.

IV. REVIEW ON WRIT OF CERTIORARI IS NECESSARY TO RESOLVE EXISTING CONFLICT AMONG THE STATES, AVOID FURTHER CONFLICTING DECISIONS, PRESERVE FEDERALLY-PROTECTED RIGHTS, AND ENFORCE DECISIONS OF THIS COURT.

The decisions below directly conflict with this Court's holding in Davis, as well as in Barker, of which the Court of Special Appeals was well aware at the time of writing its opinion. In courts below, Petitioners raised the early ruling precluding discrimination against those serving a different sovereignty, and the Maryland decision now conflicts with the Arkansas Supreme Court in the case of Pledger v. Bosnick, 306 Ark. 45, 811 S.W.2d 286 (June 1991) petition for cert. filed, 60 U.S.W.L. 3173 (U.S., Sept 3, 1991)(No. 91-375). If the opinion below is not reviewed, state courts in addition to Maryland might be inclined

to uphold discriminatory taxation and deny application of this Court's decisions. Review on writ by this Court is the only means of preserving the federally-protected right under 4 U.S.C. § 111 to challenge apparently discriminatory state tax codes when denied by state courts of last resort.

Look at the present case. The Court of Appeals concluded that the other Maryland statutory provisions cited by the Petitioners as being discriminatory under the holding of the Davis case:

> "[D]o not give them the relief . . . [from] the taxes paid for receipt of a military pension." There is "no evidence that their tax . . . would be any less if the tax provisions applied equally to federal and state retirees." "There is no evidence[12] in the record which indicates that even if § 10-207(d), 10-207(e) and 207(m) were discriminatory against federal retirees, that the

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[12] But see Court's statement of "Facts" (based on evidence in the record) showing state/local taxes paid but not refunded. App. B at 5a.

> [Petitioners] would be harmed. . . . [Petitioners] do not have standing to challenge these provisions of Maryland's tax code."

Doneski, supra, at 656. [Emphasis added] But, the Petitioners contend that when federal officers or employees are subjected to state taxation, which they aver is discriminatory under controlling federal law, 4 U.S.C. § 111, constitutional doctrine and this Court's holdings in Davis and Barker, federal officers[13] and employees, as a federally- protected right, do have standing to challenge such state tax provisions.

The Davis and Barker decisions provide the ultimate legal authority, based on provisions that have existed since the Public Salary Tax Act of 1939, now

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[13] Regular Army officers have taken the oath indicated by U.S. CONST. art. VI, cl. 3. They retain their commission and duty upon retirement to "'support' and defend the 'Constitution' of the United States."

codified in 4 U.S.C. § 111, that discriminatory taxation of pay or compensation for personal service as an officer or employee of the United States violates the statute and constitutional doctrine. Petitioner wrote to the Comptroller in 1985 questioning taxation of retirement pay, but it was not until Davis was decided that the State of Maryland indicated concern. Within five days after Davis was decided on March 28, 1989, Respondent queried the Maryland Attorney General so that emergency legislation could be proposed if necessary. The General Assembly then enacted TG §10-207(q) and (r) effective July 1, 1989 pertaining to State exemption of certain pay or compensation of certain, but not all, active duty and retired military personnel.

Moreover, the Court of Special Appeals conclusion that, "even if [TG] §§

10-207(d), 10-207(e) and 10-207(m) were discriminatory against federal retirees," the federal class Petitioners "do not have standing to challenge these provisions of the Maryland tax code"--in a case involving a federal question--not only denies a federally-protected right, but, also fails to meet and manifests utter disregard for this Court's standard for review. Clearly, the issue under 4 U.S.C. § 111 is discriminatory taxation because of the source of pay or compensation, and the Davis and Barker cases both hold that the standard of review is whether there are significant differences between the favored state or local class and the disfavored federal class. Hence, regarding §§ 10-207(d), 10-207(e) and 10-207(m), a proper interpretation was not even approached below, and results in conflict with other state courts of last resort and this Court.

SUMMATION AND REQUESTS

When the principles set forth by this Court in McCulloch, Davis and Barker are applied to Maryland's tax code as enacted or administered (regardless of how the State's provisions have been used to date, or interpreted by the Maryland Comptroller), there are no "significant differences" warranting the State's inconsistent tax treatment between the federal and state/local classes.

This Court has stated that:

> "A tax exemption truly intended to account for differences in . . . benefits would not discriminate on the basis of the source of those benefits, . . . rather, it would discriminate on the basis of the amount of benefits received . . . ."

Davis, supra, at 1508. Again, Maryland,

> "The difference is that which always exists . . . between the laws of a government declared to be supreme, and those of a government which, when in opposition . . . is not supreme."

McCulloch v. Maryland, 4 Wheat. 316 at 435-436 (1819). Securing state court

compliance with federal law is a proper objective of review.

Hence, it is respectfully requested that this Court hold that the Court of Special Appeals was in error in holding that, regarding federal pay or compensation, there is no discrimination in violation of Davis. Similarly, it is requested that this Court rule that the Court of Appeals was in error in denying the Petitioners writ of certiorari to review the opinion by the Court of Special Appeals. It is further respectfully requested that the relief sought by the Petitioners be granted, and that the State income tax paid, and collected "erroneously, illegally or wrongfully" on their military retirement benefits be refunded to them by Maryland based on 4 U.S.C. § 111 and applying, and complying with, this Court's decision in Davis.

CONCLUSION

For the foregoing reasons, the Petition for writ of certiorari to the Court of Appeals of Maryland should be granted.

Respectfully submitted,

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November 21, 1992

APPENDIX A

BERNARD J. DONESKI et ux.	*	In the
	*	Court of Appeals
	*	of Maryland
v.	*	
	*	Petition Docket No. 157
	*	September Term, 1992
	*	(No. 931
STATE OF MARYLAND, COMPTROLLER OF THE TREASURY	*	September Term, 1991 Court of Special Appeals)

* * * * * * * * *

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer and cross-petition filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: August 24, 1992

APPENDIX B

REPORTED*
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 931

September Term, 1991

BERNARD J. DONESKI et ux

v.

COMPTROLLER OF THE TREASURY

Bishop,
Bloom,
Fischer,

JJ.

Opinion by Bishop, J.

Filed: May 1, 1992

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* 91 Md. App. 614; 605 A.2d 649 (1992). Opinion is verbatim as issued by the court unless otherwise indicated. Single brackets indicate court alterations. Double brackets indicate: omissions, mistakes or corrections in citations noted by Petitioners; and, additions noted in the two reported versions (further signaled by a single asterisk).

The Doneskis, appellants, filed an amended Maryland income tax return with the Comptroller of the Treasury ("Comptroller"), appellee, seeking partial refunds for state taxes they paid in the years 1985, 1986, 1987, and 1988. The Doneskis believed that the gains they recognized from the sale of United States Government obligations and the military retirement pay received by Bernard Doneski, both of which they included in their Maryland taxable income, were not properly taxable by the State of Maryland. The Comptroller disallowed the requested refunds, and the Doneskis appealed the decision to the Maryland Tax Court. On August 15, 1990, the Maryland Tax Court affirmed the Comptroller's decision to disallow the refund. Again the Doneskis appealed, this time to the Circuit Court for Montgomery County. On May 2, 1991, the Circuit Court affirmed the

decision of the Tax Court. Still not satisfied, the Doneskis have appealed to this court.

The Doneskis' various complaints with the Comptroller's determination that they were not entitled to a refund can be broken down into two contentions:

> (1) that the State of Maryland cannot tax the gains realized as the result of the sale of United States Government obligations, and
>
> (2) that the State of Maryland discriminates against federal retirees by taxing their pensions differently than state retirees.

Facts

The Doneskis filed joint resident Maryland income tax returns for all four years in dispute. Each of the four years included as income the pension received by Bernard Doneski from the Department of the Army. Additionally, for the year 1986 their calculation of taxable income included the gain realized from the sale of United States Government obligations.

The Doneskis applied to the Comptroller, seeking to amend their returns by using an adjusted calculation of taxable income that did not include these two sources of income. This revised calculation would result in tax refunds of $1,274.60 for 1985, $4,064.70 for 1986, $1,337.02 for 1987, and $1,061.43 for 1988 (a total of $7,737.75). The Comptroller denied the Doneskis' request for a refund.

The Doneskis appealed to the Tax Court which also denied their requested refunds. The Tax Court found that nothing in 31 U.S.C. § 3124(a) prohibited states from taxing the gain on the sale of federal obligations. Additionally, the court found that Maryland's system of taxing pensions did not discriminate in violation of the standard announced in Davis v. Michigan Department of Treasury, 489 U.S. 803, 109 S. Ct. 1500[[*, 103 L.Ed.2d 891]] (1989). In a Memorandum

Opinion and Order dated May 2, 1991, the Circuit Court for Montgomery County affirmed the decision of the Tax Court on the same grounds.

Discussion

(1)

Taxation of United States Government Obligations

The Doneskis argue that 31 U.S.C. § 3124 prohibits the taxation of obligations of the United States. That section reads in pertinent part as follows:

> (a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except-
>
> (1) a nondiscriminatory franchise tax or another nonproperty tax [[sic]] [[instead of a franchise tax]], imposed on a corporation; and
>
> (2) an estate or inheritance tax.
>
> (b) The tax status of interest on obligations and dividends, earnings, or other income from evidences of ownership issued by the Government or an agency and the tax treatment of

> gain and loss from the disposition of those obligations and evidences of ownership is decided under the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

31 U.S.C. §3124 (1988). (Section 3124 of the 1988 Code is substantively the same as it was in the tax years in question except the reference to the Internal Revenue Code was updated from "1954" to "1986.") Although section (a) does not expressly exempt the gain or loss recognized from the disposition of United States obligations, the Doneskis contend that it is broad in scope and covers all forms of taxation including those which tax the gain. They find support for their argument in the fact that section (b), which was enacted to terminate the federal tax exemption of United States obligations, does specifically mention gain which would be necessary only if section (a) prohibits taxing the gain. The Comptroller, however, responds that

§ 3124 does not preclude taxation of a gain realized on a sale of the obligation but only prohibits taxation on the obligation itself and interest generated by it. He reaches this conclusion based on the fact that that "[s]ection 3124(a) does not, within the scope of its prohibition, mention 'profit' or 'gains'" and had Congress intended the gain to be exempt from taxation it would have specifically drafted the statute to so indicate.

[[*1, 2]] "The cardinal rule of statutory construction is to ascertain and effectuate the actual intent of the Legislature." Montgomery County v. Lindsay, 50 Md. App. 675, 678 [[*440 A.2d 411]] (1982) (citations omitted). The intent of the legislature is to be determined through examination of the words of the statute and consideration of the objective of the statute. Id. When analyzing

the words of a statute, a court should not insert or delete words when the language is plain and free from ambiguity. Id. at 679[[*, 440 A.2d 411]].

Originally, United States obligations were exempt from both federal and state taxation. In 1917, Congress passed an Act authorizing an additional issue of bonds to help finance the war. Section 11 of the 1917 Act provided "[t]hat any certificates of indebtedness . . . issued shall be exempt from all taxes or duties of the United States . . . as well as from taxation in any form by or under State, municipal, or local authority . . . ." Act of Sept. 24, 1917, ch. 56, § 11, 40 Stat. 288, (1917).

Then Congress, when enacting the Public Debt Act of 1941, removed the federal tax exempt status of United States obligations but made "no change in the existing law with respect to the taxation of

Federal securities by the States and their political subdivisions." H.R. [[sic]] [[REP.]] 20, 77th Cong., 1st Sess. at 2-3 (1941); S.R. [[sic]] [[REP.]] 41, 77th Cong., 1st Sess. at 3 (1941). As a result of a 1942 amendment, section 4 of the Public Debt Act provided that obligations of the United States should not have any exemption as such "under the Federal tax acts now or hereafter enacted." Corporate Counsel for the District of Columbia construed the words "Federal tax acts" to include the act of Congress dated July 1, 1902 (32 Stat. 619) that authorized an annual tax upon the gross earnings of national banks in the District of Columbia. Corporate Counsel concluded that the District may tax, as part of a bank's gross earnings, interest on obligations issued by the United States. Congress reacted by once again amending the Act in 1947. These

changes were designed to make it clear that no other jurisdiction except the federal government was permitted to tax federal securities. H.R. [[sic]] [[REP.]] 423, 80th Cong., 1st Sess. at 1-3 (1947), S.R. [[sic]] [[REP.]] 275, 80th Cong., 2d [[sic]] [[1st]] Sess. at 1-4 (1947).

The 1959 amendment to § 3124, which added the second sentence to § 3124(a), was intended to abolish the formalistic inquiry into whether the tax is on a distinct interest (i.e., a property interest or transaction separate from the ownership of federal obligations), and to replace it with the inquiry into whether computation of the tax requires consideration of federal obligations. American Bank and Trust Co. v. Dallas County, 463 U.S. 855, 862[[*, 103 S.Ct. 3369, 3374, 77 L.Ed.2d. 1072]] (1983), reh'g denied 463 U.S. 1250[[*, 104 S.Ct. 39, 77

L.Ed.2d. 1457]] (1983). Under the 1959 amendment "the tax is barred regardless of its form if federal obligations must be considered, either directly or indirectly, in computing the tax." Id. (emphasis supplied). Federal obligations are "considered" when they are "taken into account or included in the accounting." Id.; First National Bank of Atlanta v. Bartow County Bd., 470 U.S. 583, 588[[*, 105 S.Ct. 1516, 1519, 84 L.Ed.2d 535]] (1985). In American Bank, the Court found that a tax computed by determining the amount of the bank's capital assets takes into account, at least indirectly, the federal obligations that constitute a part of the bank's assets. 463 U.S. at 863[[*, 103 S.Ct. at 3377]].

Further, the 1959 amendment sought to make "'it clear that both the principal and interest on United States obligations are exempt from all state taxes except

nondiscriminatory franchise, etc. taxes' (emphasis supplied)." American Bank, 463 U.S. at 867[[*, 103 S.Ct. at 3377]] (quoting S. Rep. No. 909, 86th Cong. 1st Sess., 11 (1959) and H.R. Rep. No. 1148, 86th Cong., 1st Sess., 12 (1959)). "Congress intended to sweep away formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations." Id. "The exemption for federal obligations provided by § 3701 (now §3124), as amended in 1959, is sweeping: with specific exemptions, it 'extends to every form of taxation that would require that either the obligation or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax.'" Id. at 862[[*, 103 S.Ct. at 3374]] (emphasis supplied).

The extent of this exemption was set forth in earlier Supreme Court cases. In

New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 675[[*, 70 S.Ct. 413, 418, 94 L.Ed. 439]] (1950), the Supreme Court addressed the issue of "whether in practical operation and effect the tax [on net worth of a corporation, measured by corporate capital and surplus less liabilities] is in part a tax upon federal bonds." Id. at 673[[*, 70 S.Ct. at 417]]. The Court noted that the legislative purpose of §3701, "'to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit[,]' Smith v. Davis, 323 US [[sic]] 111, 117, 89 L ed [[*L.Ed.]]107, 111, 65 S Ct [[*S.Ct.]] 157 [[*160]] (1944)", required the exemption from tax assessment of "interest on federal securities which had accrued but was not yet paid."

Id. at 675-76[[*, 70 S.Ct. at 418-19]]. And in People, ex rel., Leonard v. Commissioners of Taxes, etc., of New York, 90 N.Y. [[*63]] 64, 65, 55 N.Y.S. 812 (1882), the Supreme Court extended the tax exempt status not only to the par value of United States bonds but also to the premium value of the bonds, namely, the actual market value of the bond in excess of par value. Id. at 65[[*, 55 N.Y.S. 812]]. The court said:

> When[[,]] therefore[[,]] a government loan is put upon the market, it is plain to be seen that it may be materially affected if it were known that, whenever the bonds to be issued should, in the market, from any cause, happen to be at a premium when the assessors came to make their assessment, such premium could be assessed in [[sic]] [[and]] tax[[ed]]. Such a tax would affect the value of the bonds and embarrass the government in affecting [[sic]] [[effecting]] a loan in the same way, if not in the same degree, that a tax upon the bonds, eo nomine would.

Id. at 66[[*, 55 N.Y.S. 812]]. The Court reasoned that a tax upon the premium,

which is not distinct and cannot exist apart from the bond, "would affect the value of the bonds and embarrass the government in effecting a loan in the same way, if not in the same degree, that a tax upon" the principal or interest of the bond would and such a tax on principal and interest is clearly exempted. Id. at 66-67[[*, 55 N.Y.S. 812]]. "The premium is part of the entire value of the bond, and when that is taxed the bond is taxed, or what is equally condemned, the value or a part of the value of the bond is taxed. " Id. at 67[[*, 55 N.Y.S. 812]].

[[*3]] With that background, we must now examine the tax scheme as it presently exists in Maryland. The calculation of an individual's Maryland tax liability is based upon that individual's federal adjusted gross income. Md. Tax-General Code Ann. § 10-203 (previously § 10-204)

(1991). The federal adjusted gross income includes interest earned from United States obligations issued after March 1, 1941 but excludes interest on state and local bonds. See Internal Revenue Code § 103 (1990) and Treas. Reg. § 1.103-4. Whether federal adjusted gross income includes the gain realized upon the sale or transfer of a bond depends on a number of factors, including the type of bond or debt instrument held, when it was issued, and whether the issuer had an intention to call the bond before maturity. See Maxwell MacMillian, Federal Taxes 2nd 1992 Federal Tax Handbook ¶ 1317 (1991).

In order to calculate the Maryland adjusted gross income, certain adjustments are made to the federal adjusted gross income amount. Various items, which are listed in Md. Tax-General Code Ann. §§ 10-204 and 10-205 (previously §§ 10-205 and 10-206) (Supp. 1991), are

added to the federal adjusted gross income. Additionally, under Md. Tax-General Code Ann. §§ 10-207 - 10-210 (Supp. 1991), several classes of income are subtracted. These subtractions include dividend and interest income from United States obligations (§ 10-207(c)) and the profit realized from the sale or exchange of bonds issued by the State (10-207(j)).

The net result is that the interest from United States obligations is always taxed by the federal government and never taxed by Maryland. The gain from sale of United States obligations is sometimes taxed by the federal government and when it is, the amount is included in the federal adjusted gross income and is thereby taxed by the State because there is no provision in Maryland's code which permits its subtraction from federal adjusted gross income. On the other

hand, interest on obligations issued by Maryland are not taxed by either the federal government or the State of Maryland. Gains from the sale of Maryland obligations are sometimes taxed by the federal government, but are never taxed by the State of Maryland.

[[*4]] We need not address the question as it is posed by the Doneskis, namely whether the State can tax gains from the sale of federal obligations, because "[a] state tax that imposes a greater burden on holders of federal property than on holders of similar state property impermissibly discriminates against federal obligations." Memphis Bank & Trust Co. v. Gardner [[sic]] [[Garner]], 459 U.S. 392, 397[[*, 103 S.Ct. 692, 695, 74 L.Ed.2d 562]] (1983); see also New Jersey Realty., 338 U.S. at 675, [[*70 S.Ct. at 418,]] Missouri ex rel. Missouri Insurance Co. v. Gehner,

281 U.S. 313, 321-322[[*, 50 S.Ct. 326, 327-28, 74 L.Ed. 870]] (1930). Maryland's taxation scheme, as it is presently constructed, impermissibly discriminates against holders of federal obligations by diminishing the investment attractiveness of the United States obligations in favor of state obligations.

Although § 3124 only expressly prohibits a state from taxing, directly or indirectly, a federal obligation or interest thereon, and does not specifically address taxation of capital gains or state action which discriminates between a federal and state obligation, the purpose of § 3124 as noted in New Jersey Realty, is "'to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of [federal] [[sic]] obligations . . . :'" New Jersey Realty,

338 U.S. at 675[[*, 70 S.Ct. at 419]] (quoting Smith v. Davis, 323 U.S. 111, 117[[*, 65 S.Ct. 157, 160, 89 L.Ed. 107]] (1944)). The Maryland tax scheme that taxes only gains on federal obligations, but not on state obligations, is impermissibly discriminatory precisely because it makes federal obligations less attractive (i.e, less valuable) than similar state obligations. This in turn violates the purpose of § 3124 expressed in New Jersey Realty.

> The state cannot, by any form of taxation, impose any burden upon any part of the national public debt. The Constitution has conferred upon the government power to borrow money on the credit of the United States, and that power cannot be burdened or impeded or in any affected by the action of any state.

Home Sav. Bank v. Des Moines, 205 U.S. 503, 513[[*, 27 S.Ct. 571, 573, 51 L.Ed. 901]] (1907); Weston v. Charleston, 27 U.S. [[*(2Pet.)]] 449, 467[[*, 7 L.Ed. 481]] (1829).

This tax clearly discriminates against the federal government and the people with whom it deals in violation of the principle announced in Davis v. Michigan Dept. of Treasury, 489 U.S. 803, [[* 109 S.Ct. 1500,]] and reiterated most recently in Baker [[sic]] [[Barker]] v. Kansas, _____ U.S. _____, No. 91-611, slip op. _____, (April 21, 1992) (WL77246) [[*, 112 S.Ct. 1619, _____, 118 L.Ed.2d 243 (1992)]]. Although Davis involved a discriminatory state tax on income derived from federal but not state pensions, we find that issue analogous to the one before us concerning a discriminatory state tax on gains from the sale of federal but not state obligations. 489 U.S. at ___[[sic]] [[*808-11]], 109 S. Ct. at 1504-05. In Davis the Court interpreted 4 U.S.C. § 111 (1988), which in relevant part provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

After determining that the pension payments to the appellant did amount to "pay or compensation for personal service as an officer or employee" of the federal government the Court concluded

> [s]ection 111 did not wave all aspects of intergovernmental tax immunity, however. The final clause of the section contains an exception for state taxes that discriminate against federal employees on the basis of the source of their compensation. This nondiscrimination clause closely parallels the nondiscrimination component of the constitutional immunity doctrine which has, from the time of McCulloch v. Maryland, [[*4 Wheat. 316, 4 L.Ed. 579 (1819)]] barred taxes that "operat[e] so as to discriminate against the Government or those with whom it deals."

Davis, 489 U.S. at ___[[sic]] [[*812]], 109 S.Ct. at 1506 (citations omitted).

The Court concluded "that the Michigan Income Tax Act violates principles of intergovernmental immunity by favoring retired state and local government employees over retired federal employees." 489 U.S. at ___[[sic]] [[*817]], 109 S.Ct. at 1508.

Maryland's present tax scheme discriminates against the holders of United States obligations in relation to holders of Maryland obligations. This discrimination means that United States obligations are less attractive to potential investors if every other factor is held constant.

> It is elementary that the bonds or other securities of the United States may not be taxed by state authority. That immunity always has been deemed an attribute of national supremacy and essential to its maintenance. The power of Congress to borrow money on the credit of the United States would be burdened and might be destroyed by state taxation of the means employed for that purpose. As the tax-exempt feature tends to increase and is reflected in the market

> price of such securities a state tax burden thereon would adversely effect the terms upon which money may be borrowed to execute the purpose of the general government. It necessarily follows from the immunity created by Federal authority that a state may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities. Neither ingenuity in calculation nor form of purge in state enactments can deprive the owner of the tax exemption established for the benefit of the United States.
>
> . . . .
>
> . . . [W]here, as in this case, the ownership of United States bonds is made the basis of denying the full exemption which is accorded to those who own no such bonds, this amounts to an infringement of the guaranteed freedom from taxation.

Missouri Insurance Co., [[sic]] [[Gehner]] 281 U.S. at 320-322[[*, 50 S.Ct. at 327-28]] (emphasis added) (citations omitted). All other factors being equal, an investor who is required to pay tax on the gain from the sale of a United States obligation gets a smaller return on every dollar invested than does an investor who pays no tax on the gain from

the sale of a state obligation. To attract the same number of investors or the same amount of money from investors under this discriminatory tax scheme, the federal government may be forced to raise the interest rate on its obligations, increasing the cost and decreasing the value of those funds to the federal government. See id. Thus, the current tax structure adversely affects the ability of the federal government to raise money and thereby violates the purpose of § 3124.

The Comptroller in its brief does not directly address the issue of discrimination. The Comptroller does cite a passage from South Carolina v. Baker, 485 U.S. 505, 523[[*, 108 S.Ct. 1355, 1366, 99 L.Ed.2d 592]] (1988), reh'g denied, 486 U.S. 1062[[*, 108 S.Ct. 2837, 100 L.Ed.2d 937]] (1988), which holds that a state cannot tax the United States

directly but can tax private parties with whom the United States does business even though the tax burden falls on the United States. The Comptroller, however, fails in his argument or response to include the Court's restriction that the tax is constitutional only "so long as the tax does not discriminate against the United States or those with whom it deals." Id. at 1366. The Comptroller also cites Dept. of Assess. & Tax v. Nat. [[sic]] [[Nat'l]] Bank, 310 Md. 664, 670[[*, 531 A.2d 294]] (1987), appeal dismissed, 486 U.S. 1048[[*, 108 S.Ct. 2812, 100 L.Ed.2d 913]] (1988), for the proposition that the State can tax the gain because it is not "tax[ing] the bonds or the interest on them." That case, however, is inapplicable because not only was the tax in question a franchise tax, but it also did not discriminate against federal

obligations. Id. at 666[[*, 531 A.2d 294]].

It is worth emphasizing specifically that we are not deciding whether a state is prohibited under all circumstances from taxing the gain on a United States obligation, but instead, we are merely holding that the present tax scheme, because it discriminates against holders of United States obligations, violates federal law. Accordingly, the Doneskis are entitled to a refund for the amount of state tax that they paid for the gain they realized on the sale of their United States obligations in 1986.

(2)

Taxation of Federal Pension

We turn again to Davis, to address the appellant's contention that Maryland discriminates against federal retirees by taxing their pension differently than the pension of State retirees. The Supreme

Court held in Davis that the State of Michigan violated 4 U.S.C. § 111 by taxing the retirement benefits of federal employees but exempting retirement benefits paid by the State. 489 U.S. at ___[[sic]] [[*816]], 109 S.Ct. at 1508. The relevant part of § 111 is quoted supra. As long as a state's tax scheme does not discriminate against those who deal with the federal government, a state can tax federal pensions. Id. [[*109 S.Ct.]] at 1508.

The Doneskis contend that Maryland's tax scheme also violates 4 U.S.C. § 111 because several code provisions discriminate against federal retirees. They point to four different sections of Maryland Tax-General Code Ann. (Supp. 1991); § 10-207(h) (fire, rescue, or ambulance personnel length of service award funded by any county or municipal corporation of the state is exempt),

§ 10- 207(d) (income that is attributable to employer-provided vehicles to state, county or local policemen or firemen is exempt), § 10- 207(e) (disability pension to policemen and firemen is exempt) and § 10- 207(m) (pickup contributions for member of retirement or pension system are exempt), that they claim are discriminatory. Their argument, however, focuses mainly on § 10-27(h). This is probably due to the fact that Justice Stevens in his dissenting opinion in Davis, in a footnote, listed § 10-207(h) (then § 10-207(o)) as one of a number of state code provisions which "grant special tax exemptions for retirement income to state and local government employees that they do not grant to federal employees." Id. [[* 109 S.Ct.]] at 1511 n.3.

Section 10-207(h) states that "payment received under [[a]] fire, rescue, or

ambulance personnel length of service award program that is funded by any county or municipal corporation of the State" can be subtracted from federal adjusted gross income for the purposes of calculating Maryland adjusted gross income. Since this provision was enacted by the legislature in 1988, the length of service programs that have been created have only been for the benefit of volunteer firefighters and rescue workers. See Md. Ann Code art. 25, §§ 13A, 13B, 13C, 13D, 32.5, 32.6 (1990 & Supp.1991); Md. Ann. Code art. 38A, § 43 (1990); Utica Mut. v. Gaithers[[sic]] [[*Gaithersburg]]-Wash. Grove Fire, 53 Md. App. 589, 598, n.9[[*,455 A.2d 987]] (1983), cert. denied, 294 [[*296]] Md. 224 (1983). Further, the Comptroller has interpreted § 10-207(h) to apply only in cases where the firefighters, rescue workers, or ambulance personnel are

volunteers. See Maryland Income Taxgram, vol. X, no. 3, at 1-2.

"[Volunteer firemen] are not public officers or public employees." Macy v. Heverin, 44 Md. App. 358, 364[[*, 408 A.2d 1067]] (1979); Utica Mut., 53 Md. App. at 595[[*, 455 A.2d 987]]. Moreover, Mr. Doneski, even though he was a federal employee, could have also been a volunteer thereby entitling him to length of service payments. State tax law based on these length of service payments, therefore, does not discriminate against federal retirees because they are not retirement payments for state and local employees. Consequently, § 10-207(h) does not violate 4 U.S.C. § 11 [[sic]] [[111]] and entitle the Doneskis to a tax refund for taxes paid on his federal pension.

The other code provisions cited by the Doneskis also do not give them the relief

they seek, namely, a refund of the taxes they paid for receipt of a federal pension. There is no evidence in the record which indicates that even if §§ 10-207(d), 10-207(e), and 10-207(m) were discretionary against federal retirees, that the Doneskis would be harmed. The damage which taxpayers suffer as the result of a public wrong is the "prospective pecuniary loss incident to the increase in the amount of taxes he will be constrained to pay by reason of the illegal or ultra vires act of the municipality or other political unit." Ruark v. Engineers' Union, 157 Md. 576, 589[[*, 146 A. 797]] (1929) (emphasis supplied); Citizens Committee v. Co. Comm., 233 Md. 398, 401[[*, 197 A.2d 108]] (1964); see also Citizens Planning and Housing Ass'n v. County Executive, 273 Md. 333, 339[[*, 329 A.2d 681]] (1974); Carroll Park Manor Community

Ass'n v. Board of County Comm'rs of Frederick County, 50 Md. App. 319, 325[[*,437 A.2d 689]] (1981); cert. denied 292 Md. 595 (1982). The Doneskis have provided no evidence that their tax liability would be any less if the tax provisions applied equally to federal and state retirees. In the absence of this type of evidence to show special damages--a pecuniary loss or an increase in taxes--distinct from that of the general public, the Doneskis do not have standing to challenge these provisions of Maryland's tax code. Citizens Planning, 273 Md. at 339[[*, 329 A.2d 681]]. The court is not permitted to decide a case on the basis of hypothetical facts. Maryland Pennysaver Group v. Comptroller, 323 Md. 697, 716- 17[[*, 594 A.2d 1142]] (1991).

We find that, in Maryland, state

government worker's pension payments are taxed exactly the same as federal government worker's pension payments. Thus, there is no discrimination against federal workers in violation of Davis, and the Doneskis are not entitled to a refund for any state taxes they paid pursuant to Mr. Doneski's federal pension.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 1/2 BY APPELLANTS AND 1/2 BY APPELLEE.

APPENDIX C

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

BERNARD J. DONESKI,
et al.
Appellant

vs. Civil No. 64480

COMPTROLLER OF
THE TREASURY,
INCOME TAX DIVISION
Appellee

MEMORANDUM OPINION[1]

This case is an appeal from the judgment of the Maryland Tax Court in favor of the Maryland State Comptroller of the Treasury (Comptroller). The Maryland Tax Court affirmed the Comptroller's action denying the Appellants' claim for a refund for the tax years 1985 through 1988.

---

[1] Opinion is verbatim as issued by the court unless otherwise indicated. Single brackets indicate alterations/omission by the court, although the court did not so indicate. Double brackets indicate: mistakes made by the court or corrections in citations noted by Petitioners.

Upon consideration of the Record, Memoranda, and a hearing open court, this Court holds that the decision of the Maryland Tax Court is correct as a matter of law and hereby affirms the judgment.

The Appellants raise three issues on appeal:

I. That the Maryland Tax Court erred when it concluded that gains recognized by the Appellants on the sale of United States Government obligations were taxable by the State of Maryland.

II. That the Maryland Tax Court erred when it held that military retirement pay received by Bernard J. Doneski was taxable in Maryland; and

III. That the Maryland Tax Court erred in not holding that the Appellants were entitled to a refund under §13-901 of the Tax-General Article for tax paid but

erroneously, illegally, or wrongfully assessed or collected in any manner.

I.

The Appellants argue that title 31, U.S.C. §3124(a) forbids the taxation on obligations of the United States. That section provides:

> Stocks and obligations of the United States Government are exempt from taxation by a [s]tate or political subdivision of a [s]tate. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing the [[sic]] [[a]] tax, except-
> (1) a nondiscriminatory franchise tax or another non[-]property tax instead of a franchise tax, imposed on a corporation; and
> (2) an estate or inheritance tax."

Additionally, §10-207(g) of the Tax-General Article (formerly Article 81, §280(c)(1) of the annotated Code of Md.) exempts interest or dividends on obligations of the United States from state taxation.

The Maryland Tax Court was correct, as a matter of law, that the Comptroller has taxed neither the obligation nor the interest on the obligation. State Department of Assessments & Taxation v. Maryland Nat'l Bank, 310 Md. 664, 670 (197) [[sic]] [[1987]], appeal dismissed, 486 U.S. 1048 (1988). It is the gains on the sale of the obligations which are being taxed. The §3124(a) exemption applies to the taxation of the bonds themselves; nowhere in the statute do the words "gains" or "profits" appear. Had Congress intended to exempt gains or profits from state taxes, this section would have been drafted to so provide. Courts should not "insert or delete words with a view toward making the statute express an intention which is different from its plain meaning." Montgomery County v. Lindsay, 50 Md. App. 675, 678 (1982). Accordingly, this Court finds

that the holding of the Md. Tax Court concerning the taxation of the gain on the United States obligations is correct.

II.

The Appellants argue that state taxation of Col. Bernard J. Doneski's military pension is unconstitutional under the recent Supreme Court decision Davis v. Michigan Department of the Treasury, 109 S.Ct. 1500 (1989). The Appellants are correct that Davis prohibits discriminatory taxation of federal pensions versus taxation of state pensions.

The Appellants argue that §10-207(h) (formerly §10-207(o)) of the Tax-General Article provides discriminatory treatment of federal pensions versus state pension taxation. Section 10-207(h) provides a subtraction from federal adjusted gross income on a Maryland tax return "a payment received under a fire, rescue, or

ambulance personnel length of service award program that is funded by any county or municipal corporation of this [[sic]] [[the]] State."

However, federal pensions and state pensions are taxed in the same manner by the State of Maryland. Whether certain of income is taxable or not depends whether it is included in federal adjusted gross income. See §10-204 Tax-General Article. Generally, all pensions are include within federal "adjusted gross income" from which state taxable income is derived. 26 U.S.C. § 61(a)(11). There is not exclusion in federal or state law for either federal or state pensions.

Section 10-207(h) only applies to length of service awards given by a county or municipality to persons who volunteer their services to non-governmental fire and rescue companies. It does not treat at all, and therefore does not

treat differently, transactions between the state and federal government and their respective pension recipients. 74 Opinions of the Attorney General - (1980) [[sic]] [[(1989)]] (Opinion No. 89-014 (April 7, 1989).

The Tax Court correctly stated that any fire/rescue volunteer who received such an award is entitled to the §10-207(h) modification. Any fire/rescue volunteer includes any retiree, whether or not he/she receives a federal or state pension. Accordingly, the Maryland Tax Court correctly held that there is no differential treatment between federal or state retirees of these awards. Therefore Davis does not apply.

III.

As to the third issue raised by Appellants, §13-901 of the Tax-General Article does not apply because, as discussed

above, the taxes at issue were not wrongfully assessed or collected.

Accordingly, it is, this 1st day of May, 1991, by the Circuit [c]ourt for Montgomery County, Maryalnd [[sic]] [[Maryland]],

ORDERED, that the judgment of the Maryland Tax Court is hereby affirmed.

/s/ Irma S. Raker

IRMA S. RAKER

Judge of the Circuit Court for

Montgomery County, Maryland

Filed May 2, 1991

APPENDIX D

BERNARD J. & MARY L. DONESKI	*	IN THE
vs.	*	MARYLAND TAX COURT
COMPTROLLER OF THE TREASURY	*	Income Tax No. 3126

ORDER

The above entitled case having come on for hearing, testimony having been taken and the matter considered, it is this 15th day of August, 1990, by the Maryland Tax Court ORDERED, that the action of the Respondent denying the Petitioners' claim for a refund be and the same is hereby AFFIRMED for the tax years 1985 through 1988.

CERTIFIED TRUE COPY
Test: ROBERT L. ZOUCK, Clerk

cc: Col. Bernard J. Doneski
Pamela Gardner
Gerald Langbaum, Esq.

NOTICE: You have the right to appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Order of Appeal MUST be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court.

8/15/90

BERNARD J. & MARY L. DONESKI	*	IN THE
vs.	*	MARYLAND TAX COURT
COMPTROLLER OF THE TREASURY	*	Income Tax No. 3126
	*	

MEMORANDUM OF GROUNDS FOR DECISION

Petitioners appear before this Court seeking a reversal of the Respondent's denial of refund claims for the tax years 1985, 1986, 1987 and 1988. The pertinent facts have been stipulated to by the parties and rescitation here is not necessary. Petitioners' appeal is based on two grounds: (1) the State of Maryland cannot tax the gain realized on the sale of United States obligations, i.e. Treasury Bonds; and (2) the State of Maryland has enacted a law which discriminates in its treatment of taxation between federal retiree pensions and state pensions and this law is unconstitutional based on the recent

Supreme Court decision of Davis v. Michigan Department of the Treasury, 489 U.S. _____ (1989). Both parties presented testimonial and documentary evidence, and the Court has heard their arguments. For the following reasons, we shall affirm the denial of the refund claims.

As to their first point of contention, Petitioners argue that Title 31, U.S.C. §3124(a) controls. That section provides:

> "Stocks and obligations of the United States Government are exempt from taxation by a [s]tate or political subdivision of a [s]tate. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except -- (1) a nondiscriminatory franchise tax or another non-property tax instead of a franchise tax, imposed on a corporation; and (2) an estate or inheritance tax."

Although State law (former Article 81, §280(c)(1) of the Annotated Code of Maryland) exempts interest or dividends

on obligations of the United States from state taxation, Petitioners aver that this exemption does not extend far enough pursuant to the language of §3124(a). The federal law prohibits, according to the Petitioners, not only taxation on the obligation (or principal) and the interest on the obligation, but also taxation on any gain or profit realized from the sale of the obligation.

However, we do not read such a prohibition into the language of §3124(a). Respondent is taxing neither the "obligation" nor "the interest on the obligation." Neither is "considered in computing a tax." It is the gains on the sale of the obligation that are being taxed. Nowhere in §3124(a) do the words "gains" or "profits" appear, and this Court will not read them into the statute. §3124(a) exemption applies to the taxation of the bonds themselves

and the Court of Appeals has stated that "Maryland has not taxed the bonds or the interest on them." State Department of Assessments and Taxation v. Maryland Nat'l Bank, 310 Md. 664, 670 (1987). This Court has been presented nothing to dispute that statement.(1) Accordingly, we find that §3124(a) does not prohibit the State of Maryland from taxing the gain on the sale of United States obligations.

The second issue presented by Petitioners concerns §10-207(o) (now §10-207(h)

---

(1) Subsequent to the hearing in this case, the Court requested of the parties to comment on another Maryland National Bank decision wherein this Court found §3124(a) to be discriminatory [[sic]] as applied to the franchise tax law which taxed gains on sales of federal obligations but not gains on sales of state obligations. Maryland Nat'l Bank v. State Department of Assessments and Taxation, Misc. 532 (1985). Based on the Court of Appeals decision in the companion Maryland National Bank case cited, this Court, if faced with the franchise tax again, would now have difficulty in ruling that the §3124(a) exemption would apply to the taxation of the gains on sales of U.S. obligations.

of the Tax-General Article of the Annotated Code of Maryland and whether this section indicates a discriminatory treatment of federal pensions versus state pension taxation, which has been prohibited by the Davis Supreme Court decision, supra. §10-207(o) provides for a subtraction modification from federal adjusted gross income of "payment[s] received under a fire, rescue, or ambulance personnel length of service award program that is funded by any county or municipal corporation of the State." Petitioners contend that this statute permits preferential treatment for taxation of state pensions which is not rendered to federal pensions, contrary to what the Supreme Court ruled in Davis.

We disagree. §10-207(o) applied to length of service awards (not pensions) to volunteer fire, rescue or ambulance personnel given by a county or

municipality. Any volunteer who receives such an award is entitled to the subtraction modification. Any volunteer includes any retiree, whether he/she receives a state government pension, a federal pension or a privately funded pension. There is no differential treatment in the taxation between federal or state retirees of these awards. Therefore, Davis does not apply.

In addition, Petitioner has presented no other Maryland law which does give preferential treatment in the taxation of state pension income over federal pension income. Petitioners' reliance on the statute (§10-207(o)) cited in the dissenting opinion in Davis is misplaced.

Based on the above, we shall pass an Order affirming the Respondent's action in denying all the refund claims for the years 1985 through 1988 inclusive.

APPENDIX E

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

ALBERT J. SCHAFFER,

Petitioner

Vs. CAL 90-22202

COMPTROLLER OF THE TREASURY
INCOME TAX DIVISION

Respondent

OPINION AND ORDER OF COURT

This matter came before the Court on an appeal of an Order of the Maryland Tax Court, dated September 11, 1990, denying the Appellant, Albert J. Schaffer, a claim for a refund. Both parties submitted memorandum of law that the Court reviewed prior to reaching its decision in this matter. On January 25, 1991, the Court heard oral arguments at which time the matter was taken under advisement.

Although the parties are in agreement that there is no factual dispute, a review of the facts is important to set out

at this time. The Appellant is a former Internal Revenue Service employee who is retired on a disability pension. He claims that his disability arose out of and in the performance of his duties as a Federal employee. The Appellant filed an amended Maryland tax return, seeking a refund based on the theory that all of his federal disability pension income was exempt from taxation by the State of Maryland. At the center of the Appellant's argument is Tax General Section 10-207(e), which grants a tax exemption for the disability retirement pay of police and firefighters. He alleges that this statute impermissibly discriminates against persons in the position of the Appellant who are disabled during the course of their employment, but not granted the same exemption. The Maryland Tax Court found that the Appellant was not entitled to the exemption because he

was neither a policeman nor a fireman. The Tax Court also found Davis v. Michigan Department of Treasury, 109 S.Ct. 1500 (1989), not controlling. It also stated that there was a rational basis for the legislature to create the classification for firefighters and policemen.

This Court is mindful of its role in reviewing the decision of the Maryland Tax Court. It acknowledges that it can not, and more importantly, must not engage in judicial fact finding or substitute its judgment for that of the Tax Court. In this light, therefore, this Court finds that the Tax Court's decision is well supported by the evidence presented to it. In addition, the provision of the Maryland Tax Code in question, when challenged on equal protection grounds is subject to rational basis review. It is presumed constitutional and

the burden is on the challenger to show otherwise. The Appellant failed to make such a showing below and is therefore not entitled to reversal of the Tax Court's decision.

It is therefore, this 6th day of March, 1991, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the decision of Maryland Tax Court be, and the same is hereby AFFIRMED.

/s/
GRAYDON S. McKee, III, JUDGE

/s/
Jan Dunivant, Administrative Aide
Date: March 6, 1991

APPENDIX F

EXCERPTS OF RELEVANT

UNITED STATES CODE

TITLE 10 - ARMED FORCES

* * *

10 U.S.C. § 3911. Twenty years or more: regular or reserve commissioned officers

(a) The Secretary of the Army may, upon the officer's request retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer.

* * *

TITLE 26 - INTERNAL REVENUE CODE

26 U.S.C. § 61. Gross income defined

(a) General definition

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived including (but not limited to) the following items:

(1) Compensation for services . . .

* * *

(4) Interest;

* * *

(7) Dividends;

* * *

(9) Annuities;

* * *

(11) Pensions;

(12) income from discharge of indebtedness;

* * *

26 U.S.C. § 414 (h) Tax treatment of certain contributions

(1) In general

Effective with respect to taxable years beginning after December 31, 1973, for purposes of this title, any amount contributed --

(A) to an employees' trust described in section 401(a) or

(B) under a plan described in section 403(a) or 405(a) shall not be treated as having been made by the employer if it is designated as an employee contribution.

(2) Designation by units of government

For purposes of paragraph (1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

* * *

42 U.S.C.S. PUBLIC HEALTH AND WELFARE

42 USCS § 3796b. Definitions

As used in this part [42 USCS §§ 3796 et seq.] --

* * *

(3) "firefighter" includes an individual serving as an officially recognized or designated member of a legally organized volunteer fire department; and an officially recognized or designated public employee member of a rescue squad or ambulance crew who was responding to a fire, rescue or police emergency;

* * *

(6) "public agency" means . . . any State of the United States, . . . or any unit of local government, department, agency, or instrumentality of any of the foregoing; and
(7) "public safety officer" means an individual serving a public agency in an official capacity, with or without compensation, as a law enforcement officer, a firefighter, or rescue squad or ambulance crew.

APPENDIX G

EXCERPTS OF RELEVANT ANNOTATED CODE OF MARYLAND[1]

Income Tax

Art. 81, § 279. Definitions.

* * *

(k) "Employer" means any person, the federal government . . . the State of Maryland and any county, municipal corporation or political subdivision or instrumentality of this State, employing or utilizing the services of one or more individuals for hire, remuneration or compensation of any kind. (1985, ch. 287; 1987, ch. 713.)

* * *

Subtitle 2. Maryland Taxable Income Calculations for Individual.

Part I. Maryland Taxable Income for Individual.

TG §10-201. In general.

An individual shall calculate Maryland taxable income by subtracting from the individual's Maryland adjusted gross income calculated under Part II of this subtitle an amount that equals:

(1) the exemptions allowed under Part III of this subtitle; and

---

[1] The Public General Laws of Maryland 1957. Sections prefixed here by "TG" refer to the Tax-General article of the Code as amended by Acts of 1988. References to such sections or subsections redesignated or added by Acts of 1989 are placed in brackets.

(2) the deductions allowed under Part IV of this subtitle.

* * *

Part II. Maryland Adjusted Gross Income.

TG §10-204. [TG §10-203.] In general. Except as provided in Subtitle 4 of this title, the Maryland adjusted gross income of an individual is the individual's federal adjusted gross income for the taxable year as:

(1) determined under the Internal Revenue Code; and

(2) adjusted under this Part II of this subtitle. (An. Code 1957, art. 81, §§ 280, 282; 1988 ch. 2, § 1.) [1989, ch. 178, §1.]

TG §10-205. [TG §10-204.] Additions to federal adjusted gross income -- Addbacks of federal adjustments.

(a) In general. -- To the extent excluded from federal adjusted gross income, the amounts under this section are added to the federal adjusted gross income of an individual to determine Maryland adjusted gross income.

* * *

(c) Federal tax exempt income. -- (1) If exempted by federal law or by treaty from federal but not State tax on income, the addition under subsection (a) of this section includes wages.

(2) If exempted by federal law or by treaty from federal but not State tax on income, the addition under subsection (a) of this section includes interest or dividends attributable to an obligation of:

(i) the United States . . . .

* * *

(f) Pickup contributions of retirement or pension system member. -- The addition . . . includes the amount of pickup contributions of a member of a retirement or pension system:

(1) provided for under Article 73B, § 14(l)(h), § 57(b)(l)(ii), § 89(l)(f), § 122(l)(f), or § 150(l)(f) of the Code or Article 88B, § 56(l)(g) of the Code; and

(2) excluded from federal adjusted gross income under § 414(h)(2) of the Internal Revenue Code.

(g) Tax Preference Items. -- the addition . . . includes 50% of the sum of tax preference items under § 10-222 of this subtitle.

* * *

TG §10-207. Subtractions from federal adjusted gross income . . . .

(a) In general. -- To the extent included in federal adjusted gross income, the amounts under this section are subtracted from the federal adjusted gross income of an individual to determine Maryland adjusted gross income.

* * *

(g) [c] Dividends and interest from United States obligations. -- The subtraction . . . includes interest or dividends attributable to an obligation of the United States or an authority, commission, instrumentality, possession, or territory of the United States.

* * *

(j) [d] Fire and police vehicles. -- The subtraction . . . includes income attributable to an employer-provided official vehicle used in accordance with law by a member of a State, county, or

local:
(1) police force; or
(2) fire department.

(k) [e] Fire fighter and police disability income. -- The subtraction . . . includes a payment from a pension system to an individual for a disability or injury that arose out of and in the course of the individual's employment as a policeman or firefighter.

* * *

(m) [f] Income from Development Credit Corporation of Maryland. -- The subtraction . . . includes income derived from any security, share of capital stock, or evidence of indebtedness of the Development Credit Corporation of Maryland.

* * *

(o) [h] Length of service award. --
(See Petition for Writ, infra at 17)

* * *

(r) [j] Profits on sale or exchange of State or local bonds. -- The subtraction . . . includes profit realized from the sale or exchange of a bond issued by the State or a political subdivision of the State.

(s) [k] Railroad and social security retirement income. -- The subtraction . . . includes a payment received
(1) under Title II of the Social security Act; or
(2) as a benefit under the Railroad Retirement Act.

* * *

(v) [m] Pickup contributions for member of retirement or pension system. -- The subtraction . . . includes that portion of an annuity received by a retiree of a retirement or pension system:

(1) for which pickup contributions were made under Article 73B, §14(1)(h), § 57(b)(1)(ii), § 89(1)(f), § 122(1)(f), or § 150(1)(f) of the Code or Article 88B, § 56(1)(g) of the Code; and

(2) that is included in federal adjusted gross income under § 414(h)(2) of the Internal Revenue Code.

[m] [(Supp. 1992): Pickup contributions for member of retirement or pension system. -- The subtraction . . . includes that portion of an annuity received by a retiree of a retirement or pension system:

(1) for which pickup contributions were made under Article 73B, §1-302(e) of the Code; and

(2) that is included in federal adjusted gross income under § 414(h)(2) of the Internal Revenue Code.]

* * *

(x) State tax exempt income. [(o) State tax income (sic).] -- The subtraction . . . includes any income that federal law or treaty exempts from a state but not federal tax on income.

* * *

[(q) Overseas military pay. -- (1) The subtraction . . . includes the first $15,000 of military pay that is:

(i) received by an individual who in active service of any branch of the armed forces, and

(ii) attributable to military service of the individual outside the United States.

(2) The amount of the subtraction under paragraph (1) of this subsection:

(i) is reduced dollar for dollar in the amount by which military pay received by the individual exceeds $15,000; and

(ii) is reduced to zero if the amount of military pay received by the individual exceeds $30,000.]

[(r) Military retirement income. -- (1) The subtraction . . . includes the first $2,500 of military retirement income received by an individual during the taxable year, if the individual:

(i) is at least 55 years old on the last day of the taxable year; and

(ii) was an enlisted member of the military at the time of retirement.

(2) The amount of the subtraction under paragraph (1) of this subsection:

(i) is reduced by 50% of the amount by which federal adjusted gross income exceeds $17,500; and

(ii) is reduced to zero if federal adjusted gross income exceeds $22,500.]

* * *

(An. Code 1957, Art. 81, §§ 12G-12, 280, 280D, 280E, 281A; 1988, ch. 2, § 1; ch.110, § 1; ch. 430, §§ 2, 3; ch. 664, §§ 1, 2; ch. 756.) [1989, ch. 5, § 1; ch. 8, § 2; ch. 9, § 2; ch. 178, § 2; ch. 545; ch. 590, § 1; ch. 616, § 1; ch. 637, §§ 1, 2; ch. 780, §§ 1, 2.]

TG §10-208. [TG §10-209.] Same -- Elderly or disabled individuals.

(a) Allowed. -- To determine Maryland adjusted gross income, if . . . an individual is at least 65 years old or is totally disabled or the individual's spouse is totally disabled, an amount is subtracted from federal adjusted gross income equal to the lesser of:

(1) the cumulative or total annuity, pension, or endowment income from an employee retirement system included in federal adjusted gross income; or

(2) the maximum annual benefit under the Social Security Act computed under subsection (b) of this section, less any payment received as old age, survivors, or disability benefits under the Social Security Act, the Railroad Retirement Act, or both.

(b) Determination of maximum annual benefit under Social Security Act. -- . . . the Comptroller:

(1) shall determine the maximum annual benefit under the Social Security Act allowed for an individual who retired at age 65 for the prior calendar year; and

(2) may allow the subtraction to the nearest $100. (An. Code 1957, art. 81 § 280; 1988, ch. 2, § 1; ch. 431.) [1989, ch. 178, § 2.]

* * *

Part III. Exemptions.

TG §10-211. Individuals . . . .

Whether or not a federal return is filed, to determine Maryland taxable income, an individual . . . may deduct as an exemption:

(1) $1,100 for each exemption that the individual may deduct in the taxable year to determine federal taxable income under § 151 of the Internal Revenue Code; and

(2) an additional $1,100 for each dependent, as defined in § 152 of the Internal Revenue Code, who is at least 65 years old on the last day of the taxable year. (An. Code 1957, art. 81, § 266; 1988, ch. 2, § 1.)

* * *

Part IV. Deductions and Tax Preference Items.

* * *

TG 10-218. Itemized deductions -- In general.

Only an individual who itemizes deductions on the individual's federal income tax return may elect to itemize deductions on the individual's income tax return using the sum of the itemized deductions reduced by the amount claimed as taxes on income paid to a state or political subdivision of a state.

* * *

TG §10-222. Tax preference items.

(a) "Tax preference items" defined. -- In this section, "tax preference items" mean items that:

(1) total more than $10,000 for an individual return or $20,000 for a joint return . . . .

* * *

TG §13-516. Petition and response.

(a) Petition. -- To appeal to the Tax Court, a person or governmental unit shall file with the Tax Court a written petition which states succinctly:

(1) the nature of the case;

(2) the facts on which the appeal is based; and

(3) each question presented for review by the Tax Court.

* * *

TG §13-520. Subpoenas for hearings.

(a) On receipt of a petition, the clerk of the Tax Court immediately shall issue a subpoena that requires the appropriate tax determining agency to produce at a hearing before the Tax Court:

(1) the record of the proceeding from which the appeal is taken or a certified copy of the record; and

(2) any map, plat, or other document that is connected with the record.

(b) On request. -- On request of a party, the Tax Court shall issue a subpoena that requires at a hearing before the Tax Court:

(1) the appearance of a witnesses to testify; and

(2) the production of any pertinent document.

* * *

TG §13-525. Rulings on questions of law.

(a) Request. -- A party may submit to the Tax Court a request for a ruling on a question of law that is material to the appeal.

* * *

TG §13-529. Decision and order.

(a) Written order. In each appeal, the Tax Court shall issue a written order that sets forth its decision.

* * *

TG §13-532. Judicial review.

(a) In general. -- (1) A final order of the Tax Court is subject to judicial review as provided for contested cases in §§ 10-215 and 10-216 of the State Government Article.

(2) Any party to the Tax Court

proceeding . . . may appeal a final order of the Tax Court to the circuit court.

* * *

TG §13-901.

(a) In general. -- A claim for refund may be filed with the tax collector who collects the tax, fee, or charge by a claimant who:

(1) erroneously pays to the State a greater amount of tax, fee, charge, interest, or penalty than is properly and legally payable;

(2) pays to the State a tax, fee, charge, interest, or penalty that is erroneously, illegally, or wrongfully collected in any manner; or

(3) pays a tax qualifying for a refund under subsections (b) through (h) of this section.

* * *

(c) Income tax. --

* * *

(2) A claim for refund of income tax under this subsection or subsection (a) of this section may be filed:

(i) by the claimant . . . .

* * *

TG §13-902. Form of claim.

A claim for refund shall be:

(1) made in the form and verified in the manner that the tax collector requires; and

(2) supported by the documents that the tax collector requires . . . .

* * *

TG §13-903. Time for filing claim.

A claim for refund shall be filed within the time required under § 13-1104 of this title.

TG §13-904. Determination on claim.

(a) Investigation and hearing required. -- The tax collector shall:

(1) investigate each claim for refund; and

(2) conduct a hearing at the request of the claimant prior to a final determination on the claim.

(b) Notice of action taken on claim for refund. -- The tax collector shall give the claimant notice of:

(1) the determination of the claim for refund; and

(2) any delay in paying an allowed claim.

TG §13-905. Payment.

(a) In general. -- Subject to the additional provisions of this section, a tax collector shall pay any claim for refund that has been allowed by the tax collector . . . .

* * *

TG §13-1104. Time for filing claims for refund.

(a) In general. -- Except as otherwise provided in this section, a claim for refund under this article may not be filed after 3 years from the date the tax, interest or penalty was paid.

* * *

(c) . . . income tax. -- (1) . . . a claim for refund of . . . income tax for a period may not be filed after 3 years from the date on which the return covering the period is due.

* * *

(Former) ARTICLE 81

* * *

Art. 81, § 280 (c) Amounts to be subtracted from federal adjusted gross income. -- There shall be subtracted from federal adjusted gross income:

(1) [TG § 10-207 (c) and (o)]. Interest or dividends on obligations of the United States and its territories and possessions or of any authority, commission or instrumentality of the United States and any other income to the extent includable in gross income for federal income tax purposes, but exempt from State income taxes under the laws of the United States;

* * *

(8) To the extent included, any profit realized from the sale or exchange of bonds issued by this State and its political subdivisions;

* * *

ARTICLE 25

* * *

§ 13A. Length of service award program for volunteer firemen, rescue squadsmen, and mobile intensive care units in Charles County.

In Charles County, the County Commissioners shall administer the length of service award program for volunteer firemen, rescue squadsmen, and mobile intensive care units as provided for in §§ 54-8 through 54-11 of the Code of Public Laws of Charles County. (1974, ch. 108, § 1; 1984, ch. 756; 1987, ch. 36; 1991, ch. 55, § 1.)

* * *

§ 13B. Length of service award program for volunteer firemen and rescue squad members in Calvert County.

In Calvert County, the fire and rescue commission shall administer a length of service award program for volunteer firemen and rescue squad members, as provided for in Title 14 of the Code of Public Laws of Calvert County. (1975, ch. 796, § 1; 1989, ch. 458.)

Effect of amendment. -- The 1989 amendment effective July 1, 1989, substituted "a length of service award" for "the retirement," "squad members" for "squadsmen" and "Title 14" for §§ 175-1 through 175-4."

* * *

§ 13C. Length of service award program for volunteer firemen and rescue squadsmen in St. Mary's County.

The Board of County Commissioners of St. Mary's County may:

(1) Create and establish a length of service award program for qualified members of volunteer fire departments and rescue squads; and

(2) Adopt the bylaws of this program by resolution. (1979, ch. 413; 1988, ch. 214.)

* * *

§ 13D. Monetary service award plan for volunteer firemen in Frederick County.

(a) The Board of County Commissioners of Frederick County may enact a monetary service award plan for volunteer firemen in the County based on length of service to encourage volunteer service in Frederick County. . . .
(1982, ch. 185.)

* * *

§ 32.5. Program established in Cecil County.

(a) . . . In Cecil County the Board of County Commissioners may establish and fund a Volunteer Length of Service Award Program for qualified members of volunteer fire departments, rescue squads, and ambulance corps.

* * *

(9) Allocate from the general revenue of Cecil County or from any other source of funds for the Program.

* * *

§ 32.6. Volunteer length of service award program.

The Washington County Commissioners, by resolution or ordinance, may establish and fund a volunteer length of service award program for qualified members of volunteer fire departments, rescue squads, and ambulance corps.

* * *

ARTICLE 38

* * *

Article 38A, § 43. Service award plans in Kent and Queen Anne's Counties.

The governments of Kent and Queen Anne's Counties may enact a service award plan for the volunteer firemen in the counties based on length of service. The plan shall become effective prior to July 2, 1980. (1976, ch. 371; 1982, ch. 305, §§ 1, 2; 1986, ch. 5, § 1.)

* * *

Article 38A, § 39. . . .

(See Petition for Writ, infra at 20.) (1967, ch. 395.)

* * *

Article 38A, § 41. Liberal construction.

The foregoing sections shall be liberally construed in order to effect the purpose of this subtitle to provide for mutual aid for fire departments and rescue squads in time of need. (1967, ch. 395.)

Article 38A, § 42. Disablement.

Whenever any volunteer fireman or volunteer rescue squadsman in good standing of an incorporated volunteer fire company or vounteer rescue squad in the State of Maryland, is temporarily or permanently disabled as a direct result from active participation in fighting a fire or while going to or from a fire, performing any other duties necessary to the operation and maintenance of the fire company, or actively participating in the ambulance or rescue squad work of an incorporated volunteer fire company or volunteer rescue squad in the State, the fireman or rescue squadsman shall lay his

case before the board of trustees of the Maryland State Firemen's Association . . . . If the facts are found as stated, the name of the fireman or rescue squadsman shall be placed on a list . . . and every person placed on the list shall be entitled to receive a pension from the Maryland State Firemen's . . . . .
(1957, ch. 790; 1969 ch. 342.)

* * *

Article 38A, § 45.
(See Petition for Writ, infra at 20- 21.)
(1979, ch. 364.)

* * *

TAX-GENERAL ARTICLE
(Other pertinent provisions)
* * *

TG § 1-101. Definitions.

(a) In general. -- In this article the following words have the meanings indicated.

* * *

(e) Comptroller. -- (1) "Comptroller" means the Comptroller of the State.

(2) "Comptroller," unless expressly provided otherwise, includes"

(i) an employee of the Comptroller acting within the scope of employment; and (ii) an agent or representative of the Comptroller acting within the scope of the Comptroller's authority.

* * *

(i) Income tax. -- (1) "Income tax" means the tax imposed under Title 10 of this article.

(2) "Income tax" includes the State income tax and county income tax.

* * *

TG § 1-204.

(a) "Employer" defined. In this section, "employer" has the same meaning as under the State workers' compensation laws.

* * *

TG § 3-102. Established.

There is a Maryland Tax Court, which is an independent administrative unit of the State government.

* * *

TG § 10-107. Application of federal income tax law. To the extent practicable, the Comptroller shall apply the administrative and judicial interpretations of the federal income tax law to the administration of the income tax laws of this State. (An. Code 1957, art. 81, § 304; 1988, ch. 2, § 1.)

* * *

TG § 2-606. Unallocated individual revenue.

* * *

(b) Distribution to counties, municipal corporations, and special taxing districts. -- (1) In June of each year, from current collections, the Comptroller shall distribute to each county, municipal corporation, and special taxing district a pro rata share of unallocated individual income tax revenue:

* * *

TG § 2-607. To municipal corporations and special taxing districts.

(a) Distribution. -- After making

distributions required under §§ 2-604 through 2-606 of this subtitle, from the remaining income tax revenue from individuals, the Comptroller shall distribute to each special taxing district that received an income tax revenue distribution in fiscal 1977 and to each municipal corporation an amount that, based on the certification of the Comptroller as to State income tax liability of the residents of the district or municipal corporation, equals the greater of:

(1) 8.5% of that liability; or

(2) 0.37% of the Maryland taxable income of those residents.

* * *

TG § 2-608. To county.

(a) Distribution required. -- After making distributions required under §§ 2-604 through 2-607 of this subtitle, the Comptroller shall distribute to each county the remaining income tax revenue from individuals attributable to the county income tax for that county.

* * *

PENSIONS

* * *

ARTICLE 73B

Art. 73B, § 1. Definitions.

* * *

(3) "Employee" shall . . . . include any person who is regularly employed by the State Military Department as a National Guard technician, although paid by or from federal appropriated funds, provided the employer's contribution to the retirement system, when and as

payable, shall be made by the United States, or otherwise, and provided the State shall not be responsible for payment of such employer's contribution.

* * *

(16) "Annuity" shall mean payments for life derived from the accumulated contributions of a member.

* * *

(17) "Pension" shall mean payments for life derived from money provided by the State.

* * *

(18) "Retirement allowance" shall mean the sum of the annuity and the pension, or any optional benefit payable in lieu thereof.

(19) "Retirement" shall mean withdrawal from active service with a retirement allowance granted under the provisions of this article.

* * *

Art. 73B, § 1-102. (Supp. 1992): "Maryland State Retirement and Pension Systems; established.

(a) The Maryland State Retirement and Pension Systems is established and placed under the management of the Board of Trustees to provide allowances and other benefits under this article for participants in the several systems.

. . . .

(b) The Maryland State Retirement and Pension Systems consist of:

(1) The Employees Retirement System of the State of Maryland;

(2) The Teachers Retirement System of the State of Maryland;

(3) The Pension System for Employees of the State of Maryland;

(4) The Pension System for Teachers of the State of Maryland;

(5) The State Police Retirement System of the State of Maryland;

(6) The Correctional Officers' Retirement System;

(7) The Natural Resources Law Enforcement Officers' Pension System;

(8) The Judges' Retirement System of the State of Maryland;

(9) The Municipal Corporations Law Enforcement Officers' Pension System;

(10) The Legislative Retirement Plan of the State of Maryland as provided in the joint resolution by the General Assembly Compensation Commission under Article III, § 15 of the Maryland Constitution; and

(11) Any other system or subsystem administered by the Board of Trustees."

* * *

Art. 73B, § 1-302. (Supp. 1992): "Annuity savings funds.

(a) The annuity savings fund of each system shall consist of accumulated contributions credited to all individual accounts of members of that system to provide for their annuities.

* * *

(c) The employee contributions provided for under the provisions of this article shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the employee contributions made and provided under this article and shall be deemed to have received the member's full salary or compensation. Payment of salary or compensation less any employee contribution shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the

services rendered by such person during the period covered by such payment, except as to the benefits provided under this article.

* * *

(e) (1) In this subsection, "approved employer" means an employer who has obtained the approval of the Internal Revenue Service to have an employer pickup program in accordance with § 414(h)(2) of the Internal Revenue Code.

(2) After January 1, 1989, the State or other approved employer of the member shall pick up the member contributions required by law for service rendered by the member from January 1, 1989.

(3) The contributions picked up under paragraph (2) of this subsection shall:

(i) Be treated as employer contributions in determining tax treatment under § 414(h)(2) of the Internal Revenue Code, as amended;

(ii) Be implemented by a reduction, equal to the amount of the pickup, of the compensation of each member required by law to make contributions to the annuity savings fund and may not be included as gross income of the member until the pickup amounts are distributed or made available to the member;

(iii) Be paid by the State or other approved employer from the same source of funds used in paying compensation to the member; and

(iv) Be treated for all purposes of this article in the same manner and to the same extent as contributions made by a member prior to January 1, 1989.

COMMITTEE NOTE

This subsection formerly appeared as Art. 73B, § 14(1)(h)."

* * *

Art. 73B, § 163. Definitions.

(a) In general. -- In this subtitle the following words have the meanings indicated.

* * *

(d) Municipal corporation. -- (1) "Municipal corporation" means a county, incorporated town, or municipality or special taxing area, or any other political subdivision of the State.

(2) "Municipal corporation" includes . . . any fire department that receives part or all of its funds from or through any county, town, municipality, special taxing area, or other political subdivision of the State . . . .